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SUPREME COURT OF THE UNITED STATES

October Term, 1998

WILLIAM H. THORPE,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner Thorpe cannot be convicted lawfully of §1341 property mail fraud, contrary to this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), where the allegations of the indictment and the proof at trial demonstrate that all aspects of Petitioner Thorpe's participation in the alleged mail fraud scheme [property and non-property] were grounded in and derived from Petitioner Thorpe's fiduciary deprivation of honest services to his employer, a non-property offense proscribed by §1346, so that the general verdict on a multi-theory instruction including legally inapplicable property mail fraud must be set aside pursuant to this Court's ruling in *Griffin* v. *United States*, 502 U.S. 46 (1991)?

2. Whether due process is denied when federal prosecutors represent their intention to introduce evidence of uncharged misconduct, under Federal Rule of Evidence 404(b), to prove motive, intent, or plan as to mail fraud offenses, but then manipulate such evidence as substantive proof of guilt of false-tax-return offenses?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is designated "Not Recommended for Full-Text Publication," and is set forth in the Appendix to this Petition at App-1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 15, 1998. [App-1] A timely petition for rehearing and suggestion for rehearing en banc was denied by order entered on November 24, 1998. [App-20] This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Mail Fraud property statute, 18 U.S.C. §1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .

The Mail Fraud non-property honest services statute, 18 U.S.C. §1346, provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Rule 404(b) of the Federal Rules of Evidence, "Other Crimes, Wrongs, or Acts," provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to

show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

The court of first instance in this case was the United States District Court for the Western District of Kentucky, which had federal jurisdiction to try this criminal case, pursuant to 28 U.S.C. §3231.

An indictment was returned on June 28, 1994, charging Petitioner William H. Thorpe in twelve counts with the offenses of mail fraud (counts 1-3), travel act (count 4), mail fraud (counts 5-6), travel act (count 7), RICO (count 8), and false statements on tax returns (counts 9-12). [Indictment, R. 1]

Petitioner Thorpe was tried before a jury in the Western District of Kentucky, from August 19, 1996 through September 6, 1996. The jury returned a verdict of guilty on each of the twelve counts charged in the indictment. [Verdict, R. 269]

On appeal, the United States Court of Appeals for the Sixth Circuit vacated the convictions on mail fraud counts 5, 6, and RICO count 8. [Opinion, Appendix, p. 1a]

At issue in this petition for a writ of certiorari are mail fraud counts 1-3, and false tax return counts 9-12.

Mail Fraud Counts 1-3

Mail fraud counts 1-3 charged a mail fraud offense under both 18 U.S.C. §1341 and §1346, alleging Thorpe

breached his fiduciary duty as general manager of Big Rivers Electric Corporation (hereinafter Big Rivers), by entering into a scheme with Eddie Brown and Shirley Pritchett (unindicted co-schemers) to secure Contract No. 589 for Eddie Brown's E & M Coal Company to supply coal to Big Rivers' power plants. Specifically, the indictment spelled out the Big Rivers company policy establishing Petitioner Thorpe's fiduciary duty to provide honest services:

> 7. Big Rivers prohibited its employees, including its senior executives, from directly or indirectly accepting money or other items of value from any person or entity engaged in business with Big Rivers.
>
> 8. Specifically, on or about July 10, 1981, on THORPE's recommendation, the Board of Directors of Big Rivers adopted a company policy providing that:
>
> > The Company prohibits employees from accepting gifts from individuals or firms conducting business with Big Rivers that by accepting may place the employee in a compromising position. Employees are encouraged to use good sound judgment in the acceptance of such gifts, and should thoroughly evaluate the intent of any gifts offered.
> >
> > Any gift accepted that results in a conflict of interest is not in the best interest of the Company and its employees and will be cause for immediate discharge. [Indictment, R. 1, p. 3]

Counts 1-3 of the indictment further charged that, as a result of Petitioner Thorpe's breach of this fiduciary duty to perform honest services, he received kickbacks from Eddie Brown through Pritchett when he used his fiduciary position as general manager of Big Rivers to influence the award of coal supply contract No. 589 to E & M Coal. Counts 1-3 alleged that Big Rivers and E & M Coal entered into Contract No. 589 on September 16, 1980. In addition to the alleged scheme, three mailings from Eddie Brown to Pritchett were alleged for "02/12/90," "03/07/91," and "09/04/92." [Indictment, R. 1]

The government's theory of proof on mail fraud counts 1-3 was that Big Rivers had the above-referenced conflict-of-interest policy; that if Thorpe received "cash money from a company doing business with Big Rivers," he would be in violation of Big Rivers' conflict-of-interest policy; and that Thorpe received payments from Eddie Brown through Pritchett in exchange for assistance to E & M Coal Company in obtaining Contract No. 589 to supply coal to Big Rivers.

The trial court instructed the jury on both §1341 property mail fraud and §1346 non-property mail fraud.

> Counts 1 through 3 allege one scheme but several theories of fraud. That is to say these counts allege that the scheme had several aspects of fraud to it in that Big Rivers — Big Rivers was deprived of money, property and intangible rights. [Trial Court's Instruction, T.E. Vol. VII, pp. 78-79]

Also, T.E. VII, pp. 75-76. The jury returned a general verdict of guilty on counts 1-3.

On appeal, Petitioner Thorpe argued, *inter alia*, that mail fraud counts 1-3 "charge only intangible, non-property, deprivation-of-honest-services §1346 mail fraud offenses, not property (intangible or tangible) mail fraud offenses." [Brief for Defendant-Appellant William H. Thorpe, p. 41] Petitioner Thorpe repeated, "the Thorpe case is a §1346 intangible, non-property case, not a property (intangible or tangible) case." [*Id.*, p. 43] Thorpe further argued that, "a multi-theory general verdict of guilt, *flawed by a legally inadequate theory*, must be set aside." [*Id.*, p. 40] In ruling on this question, the Sixth Circuit held:

> In his ninth assignment of error, Thorpe contends that reversal of the general verdict on any of the multi-theory counts in his indictment because of a legally inadequate theory mandates setting aside the guilty verdict on that count. We agree and the government

> concedes as much. Accordingly, we vacate his convictions on Counts 5 and 6. Since we did not reverse the general verdict of guilty on any other counts, we need not concern ourselves further with this issue. [Sixth Circuit Opinion, p. 19; Appendix, p. 18a]

The Sixth Circuit held that "18 U.S.C. §1341 was properly applied to Thorpe." [Sixth Circuit Opinion, p. 9; Appendix, p. 9a]

Petitioner disagrees. Petitioner submits that §1341 property mail fraud was a legally inapplicable theory as to Petitioner William H. Thorpe, which renders invalid the multi-theory general verdict of conviction on Counts 1-3.

404(b) Evidence

When Petitioner Thorpe filed a motion in limine to exclude evidence of his gambling, the government begged the Court to allow evidence of Thorpe's gambling "for proper 404(b) purposes . . . **to prove his motive and intent to commit mail fraud**." [Emphasis added. Government's Response to Thorpe's Motion in Limine to Exclude Evidence of Thorpe's Gambling, R. 131]

> *[T]he United States will offer the evidence for proper 404(b) purposes.* . . . [T]he evidence of Thorpe's gambling activities is critical to the United States' case. *The evidence will prove the motive for Thorpe, an otherwise highly compensated individual, to obtain large amounts of money through kickbacks paid by and through his co-schemers.* The gambling evidence also will prove Thorpe's intent to engage in these mail fraud schemes. The evidence will also show that Thorpe engaged in these schemes pursuant to his plan to obtain high stakes gambling money. . . . *[T]he United States will request that the Court caution the jury that* ***it may consider the evidence only to prove motive, intent or plan.*** [Emphasis added. Government's Response, R. 131, pp. 1, 6, 10]

The trial court ruled the government could introduce the evidence of Thorpe's gambling for the purpose stated [Order, R. 141]: "only to prove motive, intent or plan." [Government's Response, R. 131]

The government did introduce evidence of Petitioner Thorpe's gambling to show motive, intent or plan as to the mail fraud counts. But then the government manipulated this arguably proper 404(b) evidence of Thorpe's gambling into totally improper evidence demonstrating substantive guilt on counts 9-12, charging false statements on tax returns for 1988, 1989, 1990, and 1991. In direct examination of I.R.S. Agent Brad Keltner, the government asked Keltner to review the tax returns that formed the basis for counts 9-12.

> Q: Specifically, I want you to consider government's exhibits 181 through 184. . . . Are these the returns that form the basis for Counts 9 through 12 of the indictment?
>
> A: Yes, they do. [T.E. V, pp. 221-222]

The government asked Keltner whether gambling income must be reported.

> Q: Is there a record rule with regard to computation and reportation of gambling income?
>
> A: Yes, it is.
>
> Q: Would you please explain that to the members of the jury?
>
> A: Generally gambling income must be reported. [T.E. V, p. 227]

The government asked Keltner whether Thorpe had ever reported Las Vegas gambling winnings.

> Q: Now, is there any reportation of any winnings or losses from Las Vegas?
>
> A: No, I don't see any. [T.E. V, p. 230]

* * *

Q: Any indication of any Vegas winnings or losses there? . . . No indications of winnings from there; is that right?

A: No. [T.E. V, p. 232]

The government asked Keltner about Thorpe's Las Vegas winnings in 1986.

Q: The defendant had a pretty good year at the Frontier, didn't he?

A: It sounds like it.

Q: Do you see any gambling winnings on that tax report?

A: No, there is none reported. [T.E. V, p. 234]

The government asked Keltner about Thorpe's Las Vegas winnings in 1987.

Q: Take a look at 1987. . . . [H]ave you heard testimony that the defendant won money in Las Vegas that year?

A: Yes, he did.

Q: And do you see a reportation of any of that money on that tax form?

A: No, I do not. [T.E. V, p. 234]

During its cross-examination of the defendant Thorpe, the government asked Thorpe whether Agent Keltner's testimony was correct, that Thorpe had not reported Las Vegas winnings on his tax returns.

Q: Were you present yesterday when IRS Agent Keltner testified?

A: Yes, sir.

Q: And Mr. Keltner testified that you did not declare those winnings, I think it was around $150,000, on your tax returns.

A: Yes, sir.

Q: Did you hear him say that?

A: Yes, sir.

Q: And was he correct?

A: Yes, sir. [T.E. VI, p. 120]

During its cross-examination of the defendant Thorpe, the government examined Thorpe about his failure to report Las Vegas winnings on his tax returns.

> Q: Mr. Thorpe, I believe you testified on direct examination that when it came to gambling in Vegas, you won some years and you lost some years. . . . And 1986 was a year where you won; right?
>
> A: Yes, sir. . . .
>
> Q: Mr. Thorpe, that's your tax return for 1986, isn't it?
>
> A: Yes, sir.
>
> Q: There is no Vegas winnings on that tax return, is there?
>
> A: No, sir.
>
> Q: And I believe you said that 1987 was also a year where you won in Vegas, right?
>
> A: In Las Vegas, yes, sir.
>
> Q: Take a look at your tax return which is marked government's exhibit 180. . . . And you didn't report any Vegas winnings on that tax return either, did you?
>
> A: No, sir, I did not.
>
> Q: Now, let's go back to 1986. There was a time that you won $82,000 in one day at the Frontier Casino; isn't that right?
>
> A: How much, sir?
>
> Q: $82,000 at least in one day at the Frontier, didn't you?
>
> A: Yes, sir.
>
> Q: And in 1987, you had a day almost that big at a casino too, didn't you?

A: Yes, sir. But if you go back to 1986, I won $80,000 in one day and lost $10,000 the next day. That's on those records, isn't it?

Q: It's not on the tax return, is it? You still have $70,000 —

A: You are asking me about my winnings at Las Vegas, not what was on my tax returns.

Q: No, **I was just interested in whether or not you reported those winnings on the tax return.**

A: No, sir. [Emphasis added. T.E. VI, pp. 157-159]

The above-quoted, improper evidence that Thorpe had failed to report gambling winnings on his tax returns, was manipulated by the government for the purpose of encouraging the jury to convict Thorpe on false tax return counts 9-12, contrary to the government's representation as to the limited 404(b) purpose for which it was admitted, *i.e.*, "to prove his motive and intent to commit mail fraud" [Government's Response, R.131, p. 1], and contrary to the purpose of Rule 404(b).

REASONS FOR GRANTING THE WRIT

I. **Certiorari should be granted to resolve whether Petitioner Thorpe cannot be convicted lawfully of §1341 property mail fraud, contrary to this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), where the allegations of the indictment and the proof at trial demonstrate that all aspects of Petitioner Thorpe's participation in the alleged mail fraud scheme [property and non-property] were grounded in and derived from Petitioner Thorpe's fiduciary deprivation of honest services to his employer, a non-property offense proscribed by §1346, so that the general verdict on a multi-theory instruction including legally inapplicable property mail fraud must be set aside pursuant to this Court's ruling in *Griffin* v. *United States*, 502 U.S. 46 (1991).**

The indictment charged Petitioner Thorpe in Counts 1-3 with mail fraud, based on Thorpe's fiduciary duty to render honest services to his employer Big Rivers Electric Corporation. The indictment unmistakeably particularized Thorpe's fiduciary duty to Big Rivers:

> 7. Big Rivers prohibited its employees, including its senior executives, from directly or indirectly accepting money or other items of value from any person or entity engaged in business with Big Rivers. [Indictment, R. 1, p. 3]

Evidence at trial showed that, as a result of Petitioner Thorpe's breach of his fiduciary duty to render honest services to his employer Big Rivers, he indirectly accepted money from E & M Coal engaged in business with Big Rivers.

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court distinguished between property mail fraud and non-property mail fraud. This Court limited the application of §1341 to property rights, and held that such property rights did not include the non-property, intangible right to honest government.

> We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government, and that the statute is limited in scope to the protection of property rights." *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), restating *McNally*.

Following the decision in *McNally*, Congress enacted §1346, which criminalized deprivation of the non-property, fiduciary right to honest services.

In its essence, this case involves the same kind of fiduciary, right-to-honest-services mail fraud involved in *McNally*. The issue in *McNally* was stated by this Court:

> The issue is thus whether a state officer violates the mail fraud statute if he chooses an insurance agent to

> provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions. *McNally*, p. 360.

In *McNally*, this Court held that such fiduciary, honest-services mail fraud conduct was not within the legal application of §1341.

> We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of §1341. *McNally*, p. 361.

In Petitioner Thorpe's case, as in *McNally*, a money or property theory of prosecution was legally inapplicable, because any money or property aspect of Thorpe's case, like any money or property aspect in the *McNally* case, was based on and derived from Thorpe's non-property, fiduciary duty to render honest services. An employer's right to honest services is protected only by §1346.

Notwithstanding the essential non-property, honest services character of Thorpe's case, the trial court instructed on multiple theories of fraud, including the legally inadequate "money" and "property" theories.

> Counts 1 through 3 allege one scheme but several theories of fraud. That is to say these counts allege that the scheme had several aspects of fraud to it in that Big Rivers — Big Rivers was deprived of money, property and intangible rights. [Trial Court's Instruction, T.E. VII, pp. 78-79]

Also, T.E. VII, pp. 75-76. The jury returned a general verdict of guilty on Counts 1 through 3, which may have been based on legally inadequate theories of "money" and "property."

> AS TO COUNT 1: GUILTY X NOT GUILTY ___
> AS TO COUNT 2: GUILTY X NOT GUILTY ___
> AS TO COUNT 3: GUILTY X NOT GUILTY ___
> [Verdict, R. 269]

In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court made clear that an entire multiple-theory count of conviction must be reversed if that count contains a legally inadequate theory of conviction.

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. *Griffin, supra,* p. 59.

Because Petitioner Thorpe's conviction on Counts 1-3 may be based on legally inadequate theories of money or property mail fraud in this fiduciary, honest services mail fraud case, certiorari should be granted to set aside Petitioner Thorpe's illegal conviction on Counts 1-3.

II. Certiorari should be granted to resolve whether due process is denied when federal prosecutors represent their intention to introduce evidence of uncharged misconduct, under Federal Rule of Evidence 404(b), to prove motive, intent, or plan as to mail fraud offenses, but then manipulate such evidence as substantive proof of guilt of false-tax-return offenses.

Petitioner Thorpe stood trial on five counts of mail fraud and four counts of false statements on tax returns, *inter alia.*

The government represented to the trial court and counsel its intention to introduce Rule 404(b) evidence of Petitioner Thorpe's gambling, solely "to prove his motive and intent to commit mail fraud." [Government's Response to Thorpe's Motion in Limine to Exclude Evidence of Thorpe's Gambling, R. 131] The trial court ruled the government

could introduce evidence of Thorpe's gambling for that purpose. [Order, R. 141]

The government began by introducing such evidence of Thorpe's gambling for the arguably proper purpose, *i.e.*, to prove his motive and intent to commit mail fraud. Then, in a breach of its own representation, the government manipulated such evidence of Thorpe's gambling to prove substantive counts 9-12, charging false statements on tax returns.

Extensive examples of the government's evidence-by-ambush to thus convince the jury to convict Petitioner Thorpe on false tax counts 9-12, based on 404(b) mail fraud motive-and-intent evidence, are set forth in the Statement of the Case, *supra*.

Such cat-and-mouse tactics violate the presumption of disclosure of Rule 404(b):

> Evidence of other crimes, wrongs, or acts . . . may . . . be admissible, . . . provided . . . the prosecution in a criminal case shall provide reasonable notice . . . of the general nature of any such evidence it intends to introduce at trial. [Federal Rule of Evidence 404(b)]

This Court has held that poker-game tactics violate due process.

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. *Williams* v. *Florida*, 399 U.S. 78, 82 (1970).

This Court has condemned prosecutorial tactics of poker-game secrecy for its own witnesses.

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. *Wardius* v. *Oregon*, 412 U.S. 470, 475 (1973).

In *United States* v. *Queen*, 132 F.3d 991 (4th Cir. 1997), the Fourth Circuit articulated dangers addressed by Rule 404(b):

> There are two other dangers that Rule 404(b) addresses. First, it protects against juries trying defendants for prior acts rather than charged acts, and guards against juries becoming confused by the purpose of the admitted acts and using the acts improperly in arriving at a verdict. . . . And second, it protects against the "trial by ambush" that would occur if one were confronted at trial not only with acts alleged in the indictment but also with prior acts from the span of one's entire lifetime. Such a trial would be nearly impossible to prepare for effectively. *Queen, supra*, p. 996.

The government's misrepresentation and misuse of 404(b) evidence regarding Petitioner Thorpe's gambling are unworthy of a federal prosecutor. In *Berger* v. *United States*, 295 U.S. 78 (1935), this Court stated:

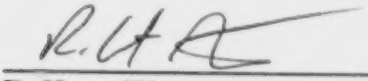
> The United States Attorney . . . may prosecute with earnestness and vigor — indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger, supra*, p. 88.

Because the prosecution represented its intention to introduce 404(b) other-crimes evidence of gambling to prove motive and intent as to mail fraud counts, but then in fact improperly used such evidence to convince jurors to find guilt on substantive false tax counts, in clear violation of both due process and the purpose of Rule 404(b), certiorari should be granted to set aside Petitioner Thorpe's unfair conviction on Counts 9-12.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX A

AMENDED

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 97-5078

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

WILLIAM H. THORPE, - - - - *Defendant-Appellant.*

On Appeal from the United States District Court
for the Western District of Kentucky

OPINION—Filed October 15, 1998

Before: NELSON, BOGGS, and CLAY, Circuit Judges.

PER CURIAM. William H. Thorpe ("Thorpe") was one of three persons indicted on June 28, 1994 for crimes related to bribery in the awarding of coal supply contracts for the Big Rivers Electric Cooperative in Henderson, Kentucky. Thorpe was indicted on 12 counts. Counts 1-3 and 5-6 alleged mail fraud, in violation of 18 U.S.C. §1341 and §1346. Counts 4 and 7 alleged violations of the Travel Act, 18 U.S.C. §1952. Count 8 alleged racketeering, in violation of 18 U.S.C. §1962(c). Counts 9-12 charged Thorpe with falsely stating his income on tax returns for the 1989-1992 tax years, in violation of 26 U.S.C. §7206(1). Due to Thorpe's medical condition, his case was severed from that of his co-defendants. A jury found him guilty on all twelve counts and returned a special verdict regarding forfeiture. Thorpe filed a timely notice of appeal. We reverse in part, and affirm in part.

I

A. *Background*

Defendant-appellant Thorpe was the general manager of the Big Rivers Electric Cooperative ("Big Rivers") in Henderson, Kentucky from May 1978 until June 3, 1992. Big Rivers contracted with coal companies to buy coal for its four coal-powered power plants through a bidding process that sought long-term contracts (at least five years) at the lowest price. The coal companies submitted sealed bids and no bidder was supposed to know the price offered by the other bidders. As the general manager of Big Rivers, Thorpe was privy to the confidential price data submitted by all bidders and he was one of three individuals who made a recommendation to the board of directors as to coal contracts. The board of directors would generally approve the recommendations made by this three-member committee. To guard the integrity of the bidding process, in 1981, Big Rivers's board of directors adopted a conflict-of-interest policy prohibiting employees of the company from accepting any gift of "excessive commercial value" from "firms conducting business with Big Rivers."

B. *The 589 Coal Contract*

In 1979, the E&M Coal Company wanted to win Big Rivers coal supply contract number 589. E&M submitted a bid in December 1979, offering coal at $23.95/ton. This bid did not win E&M the contract and E&M's president, Ed Brown, sought Shirley Pritchett's advice on getting contract 589. Pritchett was a friend of Thorpe's and he approached Thorpe about E&M and contract 589. Pritchett's initiative resulted in a meeting between Thorpe and Brown. Shortly after this meeting, Thorpe informed Brown through Pritchett of the price he would need to beat to get contract 589. E&M then submitted a new bid that was the lowest and was awarded contract 589 in September 1980.

In return for Pritchett's assistance, Brown arranged for him to get a kickback of 2% of the selling price of the coal purchased by Big Rivers during the term of the 589 contract. Pritchett, in turn, made an agreement with Thorpe

to give Thorpe 50% of the money he received from Brown. The 2% kickback was factored into the price of the bid E&M submitted to Big Rivers. Pritchett received his kickbacks in monthly checks from Ed Brown and Pritchett paid Thorpe his 50% of the kickbacks in cash. The checks Ed Brown sent Pritchett were mailed from Brown's office in Indiana to Pritchett's home in Kentucky.

This arrangement was modified not long after E&M was awarded contract 589 because, at Thorpe's request, Brown placed Thorpe's daughter on the E&M payroll and deducted her $1,200/month salary from the monthly kickbacks mailed to Pritchett. Pritchett deducted the $1,200 from Thorpe's half of the monthly kickbacks. Thorpe's daughter admitted that she never did any work for Brown or E&M Coal. Nevertheless, over time, Brown paid Thorpe's daughter $98,000. Pritchett and Thorpe split kickback checks from the 589 contract scheme until late 1992.

C. *The 527 Contract*

In March 1981, the Green River Coal Company, thru its president Clyde Brown[1], submitted a bid to Big Rivers on coal contract number 527. After Big Rivers informed Green River that its bid was not competitive, Clyde Brown contacted Ed Brown of E&M to seek his "assistance" in getting information on the Big Rivers bidding process. Ed Brown called Pritchett on behalf of Clyde Brown and Green River. Pritchett arranged a meeting between himself, Thorpe and Ed Brown to discuss contract 527. Ed Brown passed to Clyde Brown and Green River information that he had received from Thorpe about other bids on contract 527. Green River later amended its bid and was awarded contract 527. The record contains no testimony or questioning concerning the effect of the kickbacks on the price of coal purchased pursuant to contract 527.

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[1] Clyde Brown, the president of Green River, is not related to Ed Brown, president of E&M Coal Company.

In exchange for the information Ed Brown had provided to Green River, Clyde Brown arranged for Green River to pay Ed Brown 1% on "all coal sold by [Green River] to Big Rivers" during the 20-year term of contract 527. Green River and Ed Brown reduced this arrangement to writing, characterizing the payments as part of an overriding royalty agreement. At trial, Ed Brown conceded that the only reason Green River was paying him was because he had provided the company with bid information. Under the agreement, Green River paid monthly kickbacks to a dummy company Ed Brown set up called Embro Holdings.

Brown entered into a separate agreement with Pritchett under which Pritchett received 50% of the money that Embro Holdings received from Green River. Pritchett, in turn, agreed to split his share of the kickbacks with Thorpe. In 1987, Ed Brown and Pritchett bought out Thorpe's portion of the kickbacks on contract 527 for $200,000. They divided kickbacks on contract 527 equally among themselves until their interests in these kickbacks were bought out by Green River in early 1990. Thorpe's involvement in the contract 589 and contract 527 schemes resulted in his indictment and conviction on five counts of mail fraud, two counts of violating the Travel Act, one count of racketeering, and four counts of filing false income tax returns.

II

On appeal, Thorpe raises ten assignments of error. Assignments I and IV relate to mail fraud Counts 1-3 and 5-6. Assignments II, III, and V relate solely to mail fraud Counts 5-6. Assignment VI argues that the statute of limitations bars Thorpe's prosecution on the Travel Act violation asserted in Count 7. Assignment VII relates to the false tax reporting charges in Counts 9-12. Assignment VIII relates to the amount of loss used for sentencing and the amount of restitution ordered. Assignments IX and X challenge the conviction in its entirety. For the reasons that follow, we reverse in part, and affirm in part, his conviction.

A. *Arguments Related to the Mail Fraud Counts*

Mail fraud Counts 1-3 stem from Thorpe's involvement in the contract 589 scheme and Counts 5 and 6 relate to his involvement in the contract 527 scheme. We hold that one of Thorpe's assignments of error as to Counts 5 and 6 has merit and that those counts must be dismissed. However, we do not find any of the assignments directed at Counts 1-3 to be meritorious.

1. The Convictions on Counts 5 and 6 Must be Vacated

We agree with Thorpe and a previous panel of this court that the application of 18 U.S.C. §1346 to Counts 5 and 6 violates the *Ex Post Facto Clause*. As previously noted, Thorpe was initially indicted with Clyde Brown and Green River Coal Company, but his trial was severed. Clyde Brown and Green River were tried together and convicted on multiple counts stemming from their involvement in the contract 527 scheme. Green River and Clyde Brown appealed their convictions. A panel of this court decided unanimously to vacate the convictions because the trial court improperly allowed the government to introduce a great deal of evidence relating to the contract 589 scheme, in which Clyde Brown and Green River had no part, and this evidence was determined to have had a significant prejudicial effect. *United States v. Green River Coal Co. and Clyde Brown, Jr.*, Nos. 96-5617/96-5618, 1997 WL 68216 (6th Cir. Feb. 18, 1997) (unpublished).

Two members of the panel also ruled that the mail fraud counts against Clyde Brown and Green River had to be dismissed because the defendants' scheme to defraud Big Rivers of the intangible right to the honest services of Thorpe was not criminal under the mail fraud laws until 18 U.S.C. §1346[2] became effective on November 18, 1988. Judge Kennedy explained that:

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[2] The mail fraud counts against Clyde Brown and Green River were predicated on the same events related to the contract 527 scheme that formed the basis for counts 5 and 6 in Thorpe's indictment.

> In 1987, Eddie Ray Brown and Pritchett bought out Thorpe, the only person of whose intangible services the victim, Big Rivers, was deprived, for a lump sum payment of $200,000. I fail to see how a scheme to defraud Big Rivers of the intangible services of Thorpe could come into existence after Thorpe stopped receiving payments. It is true that the payoff from the agreement or scheme continued in the form of payments from Eddie Ray Brown to Pritchett, but the mail fraud statute did not make it a crime to continue to receive payments from a scheme which, if entered into after its passage, would be illegal. The statute requires that there be in existence at the time §1346 was enacted, or thereafter, an agreement or scheme to deprive someone of intangible rights. Even though an individual may be charged with the acts of a co-conspirator of which he or she is unaware, and mail fraud schemes are treated much like conspiracies, the co-conspirators here were not scheming with Thorpe or making payments to Thorpe after 1987.
>
> In order to sustain a conviction on the mail fraud count, there must be some illegal conduct after the enactment of §1346 that deprived Big Rivers of the intangible right to its employees' services or a conspiracy or attempt to do so. My review of the record convinces me that there was no such illegal conduct after Thorpe was bought out in 1987. Accordingly, I would dismiss the mail fraud count.
>
> The above does not apply to the Travel Act, because commercial bribery was a crime under state law when the bribery took place. The Travel Act punishes the distribution of proceeds of unlawful activities. 18 U.S.C. §1952(a)(1). Thus, I concur in the disposition of that count and the tax count and in all other respects in the court's opinion.

Ibid. Since Judge Merritt joined in Judge Kennedy's opinion, this view of the mail fraud counts resulting from the contract 527 scheme became the opinion of the court and the mail fraud convictions against Clyde Brown and Green River were dismissed. *Ibid.*

In a subsequent unpublished order, however, the panel in *Green River* clarified its prior ruling as it affected the mail fraud counts. *United States v. Green River Coal Co.*, 117 F.3d 1421, 1997 WL 357916 (6th Cir. June 18, 1997) (unpublished) This order stated, in relevant part:

> While Judge Kennedy's opinion, concurred in by Judge Merritt, dealt only with the "honest services" aspect of these counts, the opinion states that "there was no mail fraud crime committed." This statement failed to take into account the deprivation of property rights specified in Counts 5 and 6. (citation omitted). While the briefs and oral argument focused on the intangible rights theory, we agree with the government that there is evidence to support the allegations that Big Rivers was deprived of property rights and thus the government did not need to prove the honest services theory of fraud alleged to sustain a conviction.
>
> . . . .
>
> . . . . Judge Kennedy's opinion is amended to state that only the honest services prongs of the mail fraud count are dismissed. We do not believe the government is foreclosed from retrying these counts.

Ibid. Judge Merritt filed a separate dissent from this order. He believed that the government had failed to introduce sufficient evidence at trial to sustain any mail fraud theory other than honest services. *Ibid.*

We adhere to the disposition of the mail fraud counts related to the contract 527 scheme reached by the *Green River* court. At Thorpe's trial, mail fraud Counts 5 and 6 relating to contract 527 were submitted to the jury under both an 18 U.S.C. §1341 property rights theory and an 18 U.S.C. §1346 honest services theory. The jury returned a general verdict as to each of the twelve counts against Thorpe. It is impossible to tell which theory they relied upon in reaching guilty verdicts on Counts 5 and 6. Since we agree with the *Green River* court that the §1346 honest services theory could not be applied to Counts 5 and 6, it is unclear whether the jury based its verdict on a deficient

legal theory. The Supreme Court has ruled that:

> [A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

Zant v. Stephens, 462 U.S. 862, 881 (1983). Therefore, like the *Green River* court, we hold that Counts 5 and 6 must be vacated, but hold the government is not foreclosed from retrying Counts 5 and 6 under a deprivation of property rights theory.

2. Applying 18 U.S.C. §1346 to Counts 1-3 Did Not Violate *Ex Post Facto*

There is, however, no *ex post facto* problem with the application of section 1346 to the contract 589 scheme. There was testimony at trial that Thorpe and Pritchett received kickbacks from Ed Brown for their role in the contract 589 scheme until late 1992 and that these payments were sent from Indiana to Kentucky by mail after the effective date of section 1346. (JA 408, 519). This removes any doubt that Thorpe remained involved in a scheme or artifice to deprive Big Rivers of his honest services as to contract 589 long after 18 U.S.C. §1346 was enacted. Every court of appeals that has considered schemes straddling[3] the effective date of section 1346 has held that a defendant can be convicted under the statute despite the fact that the scheme began prior to the enactment of the statute. *See, e.g, United States v. Manges,* 110 F.3d 1162, 1172 (5th Cir. 1997); *United States v. Alkins,* 925 F.2d 541, 549-50 (2d Cir. 1991). These cases are persuasive and on point because they base the section 1346 convictions on only the defendants' role in the scheme or artifice to defraud the victims of honest services after the effective date of section 1346. Consistent with this reasoning, we find no

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[3] A scheme "straddles" section 1346 when it began before the effective date of the statute, but continued after the effective date of it.

ex post facto problem arising from the application of section 1346 to Counts 1-3 relating to the contract 589 scheme.

3. 18 U.S.C. §1341 was Properly Applied to Thorpe

Thorpe also contends that he could not be convicted of mail fraud under a property rights theory pursuant to 18 U.S.C. §1341 on Counts 1-3 relating to the contract 589 scheme or Counts 5 and 6 relating to the contract 527 scheme because he did not receive any money from Big Rivers. He further reasons that since he did not receive any money from Big Rivers, Big Rivers suffered no direct economic loss, and the absence of such a loss means that Big Rivers was not deprived of a property right cognizable under 18 U.S.C. §1341.

This argument has no merit as to Counts 1-3 relating to the contract 589 scheme, because Ed Brown explicitly incorporated the price of the kickbacks he paid Thorpe and Pritchett into the price of the coal he sold to Big Rivers. This court has previously held that a company that is the victim of mail fraud is deprived of a property right for purposes of 18 U.S.C. §1341 if the evidence shows that a supplier would have sold materials to the company for less "had it not been for kickbacks [it] had to pay defendant." *United States v. Dandy,* 998 F.2d 1344, 1358 (6th Cir. 1993).

Thorpe's argument also fails as to Counts 5 and 6. He improperly believes that the only property right sufficient to state a claim under 18 U.S.C. §1341 is direct economic loss. Undoubtedly a company has a property right in money it loses as the direct result of a scheme, but courts have recognized other property rights sufficient to sustain a §1341 conviction in the absence of direct pecuniary loss. In this case, Big Rivers was denied a property right that is cognizable under §1341—its interest in confidential business information. *Carpenter v. United States,* 108 S. Ct. 316, 320 (1987) ("confidential business information has long been recognized as property.").

In *Belt v. United States,* 868 F.2d 1208 (11th Cir. 1989), the Eleventh Circuit recognized that the property right of a business in confidential business information suffices to

sustain a conviction under the federal wire fraud statute. The defendant sold confidential bidding information to a subcontractor relating to his company's bidding process for subcontracts to work on a $15 billion petrochemical plant in Saudi Arabia. *Id.* at 1213. The court explained that:

> We see little difference in the character of the confidential information involved in this case and that involved in *Carpenter*. In both cases, the confidentiality of the information was integral to the proper operation of the employer's business and its reputation. Thus, although the scheme ***did not cause*** [the employer] ***direct monetary loss,*** like the information in *Carpenter* the confidential information constituted an intangible property right protected under [18 U.S.C.] §1343.

Ibid. (emphasis added).

Although *Belt* was a wire fraud case, its analysis is applicable to mail fraud cases under §1341. This is because the wire fraud statute (§1343) and the mail fraud statute (§1341) are, according to the Supreme Court, to be given a similar construction and are subject to the same substantive analysis. *Carpenter,* 108 S. Ct. at 320. Thus, we reject Thorpe's argument that §1341 cannot be applied to counts 5 and 6 simply because he did not receive any monies from Big Rivers as a result of the contract 527 scheme.

B. *Issues Relating to the Tax Fraud Counts*

Thorpe contends that the district court erroneously permitted the government to introduce evidence related to his gambling activities during the part of the case relating to Counts 9-12 for tax fraud. The district court allowed the government to introduce this evidence pursuant to Federal Rule of Evidence 404(b)[4] for the purpose of proving "the

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[4] Rule 404(b) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

defendant's motive, intent or plan to commit the violations alleged in the Indictment." The evidence of Thorpe's gambling activity supported the government's theory that Thorpe's motive for engaging in the bid-rigging schemes was to get money to bankroll his gambling habit.

Counts 9-12 of the indictment against Thorpe alleged that Thorpe had filed joint income tax returns with his wife on which he had understated their taxable income for 1989, 1990, 1991 and 1992. The government presented several witnesses who discussed Thorpe's frequent gambling trips to Las Vegas. One witness was a casino manager who testified that on several gambling trips Thorpe took, during the time he was receiving kickbacks, Thorpe played craps for hours at a time and his average bet was in excess of $350 per roll of the dice. The government also got the casino manager and Thorpe to admit that Thorpe had years in which he won a significant amount of money gambling in Las Vegas. The portion of the gambling testimony that Thorpe finds objectionable is the testimony of an IRS agent who testified that gambling winnings had to be reported on income tax reports and that Thorpe did not report any gambling winnings on his income tax forms. Thorpe himself testified that he had failed to report some of his gambling winnings on his tax returns for various years.

Thorpe argues that the evidence regarding his failure to report his gambling winnings on his income tax returns exceeded the scope of proper 404(b) evidence because the testimony confused the jury and provided an impermissible basis for them to convict him on Counts 9-12. This is because, according to Thorpe, Counts 9-12 were limited to false income tax filings resulting from his failure to report illegal kickbacks from the contract 589 and contract 527 schemes. Initially, Counts 9-12 were not so limited. They alleged that Thorpe filed tax returns from 1989-92 which understated the income of him and his wife. However, in its opening statement the government did say that Counts 9-12 were based on Thorpe's failure to report kickbacks.

We review a district court's evidentiary rulings under an abuse of discretion standard. *United States v. Johnson,*

27 F.3d 1186, 1190 (6th Cir. 1994). We do not think that the district court abused its discretion by allowing the IRS agent to testify that Thorpe failed to pay taxes on his gambling winnings. Upon review of the government's entire line of questioning, it appears that a key to the government's theory of the case was that Thorpe was motived to rig the bidding process in exchange for kickbacks because he needed money to bankroll his gambling. To the extent the testimony of the casino manager and Thorpe himself indicated that Thorpe actually won money when he gambled, it undercut the government's theory as to Thorpe's motive. The government responded to this testimony by eliciting testimony that gambling winnings had to be reported on taxes and that Thorpe had not reported gambling winnings for the years the testimony indicated he was a winner.

When faced with explaining why he did not report gambling winnings on his taxes, Thorpe began to change his tune and explained that although he sometimes won in Vegas, he often lost what he won in Vegas while gambling at other places. This testimony resuscitated the government's theory of Thorpe's motive. Additionally, the court gave the jury cautionary instructions explaining the limited purpose for which the evidence about Thorpe's gambling and tax returns was being admitted. In light of the discretion a district court has in making evidentiary rulings and the presumption that juries follow the instructions of the court, we cannot find that the district court committed reversible error in this case by allowing in the evidence relating to Thorpe's gambling and his failure to report gambling winnings on his income tax returns. *See United States v. Wright*, 16 F.3d 1429, 1443-44 (6th Cir. 1994).

C. *The Travel Act Conviction Stemming from the Contract 527 Scheme*

Thorpe argues that the five-year statute of limitations on Travel Act charges prevents the government from prosecuting him for violating the Travel Act in relation to the

contract 527 scheme. He asserts that his 1994 indictment on this charge was untimely because his involvement in the contract 527 scheme ended when his share of the kickbacks from this contract were bought out in 1987. He apparently assumes either that conspiracy principles do not apply to this count or that the 1987 buyout of his portion of the kickbacks amounted to a withdrawal from the bid-rigging conspiracy related to contract 527.

As Judge Kennedy noted in her concurring opinion in *Green River*, 1997 WL 68216 at *7, "[t]he Travel Act punishes the distribution of proceeds of unlawful activities." The contract 527 scheme violated Kentucky's commercial bribery statute, which set forth a crime when the scheme was conceived and throughout the lifetime of the scheme. The government established that Ed Brown and Pritchett used interstate postal facilities to disburse kickbacks from the contract 527 scheme until 1990. Thorpe was part of a conspiracy to effectuate this scheme. It is well-settled that an individual is liable for all acts of his coconspirators until he withdraws from the conspiracy by taking "affirmative action to defeat or disavow the purpose of the conspiracy." *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991). A defendant has the burden of proving withdrawal because it is an affirmative defense. *Ibid.*

Thorpe did not satisfy his burden of establishing withdrawal. There is no evidence that he sought to disavow or defeat the purpose of the conspiracy or that he took any other affirmative steps to withdraw from the conspiracy. All he did was ask his coconspirators to pay him sooner rather than later for his role in the illicit scheme so he could satiate his gambling appetite. Thorpe also continued to administer both the 527 and 589 contracts in his position as general manager of Big Rivers. Such conduct does not constitute withdrawal. Since he did not withdraw from the conspiracy, Thorpe can be held responsible for the acts of his co-conspirators in using interstate facilities in 1990 to distribute proceeds from their unlawful activities. Accordingly, the 1994 indictment charging Thorpe with a

Travel Act violation stemming from the contract 527 scheme did not violate the five-year statute of limitations.

D. *Determination of Loss for Purposes of Sentencing and Restitution*

Thorpe argues that, for sentencing purposes, the district court miscalculated the amount of loss from the scheme involving contract 589. He also claims that the district court improperly calculated the amount of restitution it ordered.

The applicable sentencing guideline is USSG §2F1.1, which requires the sentencing court to assess the fraud victim's loss. Thorpe is correct that this loss may be estimated by the defendant's gain. *United States v. Parrish*, 84 F.3d 816, 819 (6th Cir. 1996). However, he is wrong to assert that the only measure of loss for purposes of section 2F1.1 is the defendant's gain. A defendant's gain is generally employed to measure loss only where the actual loss can not reasonably be calculated. Thus, the defendant's gain is merely an alternative method for measuring the victim's loss, not a required one. *Id.* at 818. Furthermore, it is one that is generally viewed as underestimating the loss to the victim. *Ibid*

In the instant case, the district court based the loss to the victim (Big Rivers) from the contract 589 scheme on the amount of bribes that Ed Brown paid to Pritchett and Thorpe. This was a reasonable estimate because, as previously noted, Ed Brown testified that he factored the kickbacks into the price of the coal he sold Big Rivers. The record showed that these kickbacks amounted to $2.4 million. Thus, for purposes of sentencing the district court was justified in using $2.4 million as the amount of loss stemming from the contract 589 scheme. Thorpe does not challenge the loss calculation of $200,000 stemming from the contract 527 scheme.

Thorpe also complains that the district court miscalculated the amount of restitution he owed. The court ordered $3,189,537.81 in restitution pursuant to the Victim and Witness Protection Act ("VWPA") because this was the to-

tal amount of the loss the company suffered from the crimes of Thorpe and his co-schemers. The court arrived at this figure by adding $2.4 million in restitution for losses stemming from the contract 589 scheme, $200,000 for losses resulting from the contract 527 scheme, and $589,537.81 representing the salary Thorpe received from Big Rivers from the time the schemes began until Thorpe stopped serving as general manager of Big Rivers.

Thorpe argues that the district court should not have included the full amount of his salary in its restitution calculation. The jury rendered a special verdict, in which it found that the government had met its burden of establishing that the kickback payments Thorpe received were subject to forfeiture, pursuant to 18 U.S.C. §1963(a), but that the government had not "established beyond a reasonable doubt" that Thorpe should forfeit the salary he received from Big Rivers from the inception of the contract schemes until he was terminated. According to Thorpe, the jury's finding that he should not forfeit the salary he received from Big Rivers while the scheme was ongoing necessarily entailed a finding that Big Rivers received something of value from his services during this period. Therefore, he contends that the district court must make allowance for the value of these services or else Big Rivers will receive restitution for something for which it has already been at least partially compensated.

Thorpe's argument has no merit. The jury's finding that the government did not establish beyond a reasonable doubt that Thorpe should forfeit his salary does not preclude a finding by the district court that Thorpe's salary should be included in the restitution award. This is because the issue of forfeiture pursuant to 18 U.S.C. §1963 was for the jury to determine. And, more importantly, the jury was instructed that it must find facts sufficient to justify forfeiture beyond a reasonable doubt. In contrast, the issue of restitution pursuant to the VWPA is for the court to decide and the judge's decision may be based merely on a preponderance of the evidence. *United States v. Menza,* 137 F.3d

533, 537-38 (7th Cir. 1998). Therefore, there is no inconsistency in the jury finding that the government did not prove beyond a reasonable doubt that Thorpe should forfeit his salary and the district court finding that the government established by a preponderance of the evidence that he should have to make restitution to Big Rivers for his salary.

We also do not find that the amount of restitution calculated by the district court was improper. The "loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." *United States v. Comer*, 93 F.3d 1271, 1278 (6th Cir. 1996). The salary Thorpe received for serving as general manager while he was engaged in the bid-rigging schemes can certainly be considered a loss caused by the conduct underlying the offenses for which Thorpe was convicted. Big Rivers was paying Thorpe to look out for the utility's best interest. The district court could have properly determined by a preponderance of the evidence that he was not doing so once he began rigging the contracting process to enrich himself. Accordingly, we find that the district court did not miscalculate the amount of restitution due Big Rivers by including Thorpe's salary during the time he was engaged in the bid-rigging schemes.

There is, however, one matter relating to the restitution order that must be clarified. The record shows that Pritchett paid $1,011,000 in restitution to Big Rivers before he testified at Thorpe's trial.[5] Therefore, it certainly

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[5] The record states, in relevant part:

Q. Mr. Pritchett, were you indicted by a federal grand jury in Louisville and a federal grand jury in Indiana?

A. I was, sir.

Q. And were you charged with the crimes that you have admitted to participating in on Thursday afternoon and this morning?

(Footnote continued on next page)

seems that Big Rivers will be compensated beyond the loss it suffered from the fraud of Thorpe and his co-schemers if the district court's restitution order is not joint and several. The district court made no mention as to whether the restitution obligation was joint and several or whether Thorpe had to pay the entire amount.

The Tenth Circuit recently remanded a restitution order so that the district court could clarify whether it had imposed joint and several liability for the restitution obligation upon the defendant and his co-defendant. *United States v. Gottlieb,* 140 F.3d 865, 873-74 (10th Cir. 1998). The Tenth Circuit explained that if the district court "ordered Gottlieb and his co-defendant to each pay the full amount of the loss suffered by the bank, the court exceeded its statutory authority" because:

(Footnote continued from preceding page)

A. I was.

Q. And how did you plead to those charges?

A. I pleaded guilty.

Q. Did you reach a plea - plea agreement with the United States?

A. I did.

Q. You served time in prison?

A. Yes, sir.

Q. How much?

A. Eighteen months.

Q. Did as part of your plea agreement, the United States ask that your sentence be reduced from what the guidelines otherwise would have required?

A. Yes, sir.

Q. ***Did you make restitution to Big Rivers?***

A. ***I did, sir.***

Q. ***How much?***

A. **$1,011,000 and some change.**

(JA 543-545) (emphasis added).

> [A] sentencing court may not require each co-defendant to pay restitution for the entire loss suffered by the victim, because victims could [thereby] receive more in restitution than they had lost, a result at odds with both the VWPA's limited purpose and its language.

Id. at 1074. We find this reasoning equally applicable to a situation where one co-defendant pays restitution for the amount of the entire loss and another pays some portion of the entire loss. Therefore, we remand the restitution order for entry of an order providing that the restitution obligation is joint and several. This will prevent Big Rivers from receiving restitution in excess of the amount of its actual loss.

E. *Other Arguments*

In his ninth assignment of error, Thorpe contends that reversal of the general verdict on any of the multi-theory counts in his indictment because of a legally inadequate theory mandates setting aside the guilty verdict on that count. We agree and the government concedes as much. Accordingly, we vacate his conviction on Counts 5 and 6. Since we did not reverse the general verdict of guilty on any other counts, we need not concern ourselves further with this issue.

Finally, we conclude that Thorpe's last assignment of error, with one exception, has no merit. He argues that if any counts are set aside on appeal, then all other counts in the indictment must also be dismissed. Thorpe reasons that this is necessary because of the overlapping nature of the counts in the indictment and the court's use of interlocking instructions. We have already explained why the conviction of the Travel Act violation alleged in Count 7 is valid despite our reversal of the mail fraud charges in Counts 5 and 6. Since the conviction on Count 7 (violation of the Travel Act stemming from the contract 527 scheme) was valid, evidence relating to the contract 527 scheme was properly admitted. However, as the government concedes, Count 8, involving the RICO charge, must be reversed because the jury could have found guilt based on the mail fraud charges in Counts 5 and 6.

To the extent Thorpe's spillover argument depends on a reversal of the convictions on Counts 1 through 4, it is moot since we find no error as to the convictions on these counts. Nor are we concerned about the interlocking nature of the court's instructions. The district court's instructions did not contain misstatements of the applicable law. Rather, they were erroneous because they applied instructions for a violation of 18 U.S.C. §1346 to conduct that occurred before the effective date of the statute. No error arises from the application of these instructions to any other counts involving conduct occurring after the effective date of section 1346. In short, given the facts of this case and the very narrow grounds on which we reverse the convictions on Counts 5 and 6, we do not think that there was any spillover effect mandating reversal of any of the other counts in the indictment, much less all of them.

III

In summary, we **VACATE** Thorpe's convictions under Counts 5 and 6, alleging mail fraud relating to the contract 527 scheme, and Count 8, the RICO count, that might have been premised on Counts 5 and 6. However, we hold that the government may retry these counts solely on a §1341 property rights theory.[6] Thorpe's judgment of conviction and sentence is **AFFIRMED** in all other respects. Furthermore, the district court's restitution order is **REMANDED** for entry of an order stating that the restitution obligation is joint and several.

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[6] In its response to the petition for rehearing en banc, the government states that it will not retry Thorpe on Counts 5, 6, or 8, as it believes the charges in those counts would have no effect on his ultimate sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 97-5078

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

WILLIAM H. THORPE, - - - - *Defendant-Appellant.*

ORDER—Filed November 24, 1998

BEFORE: NELSON, BOGGS, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Therefore the panel adheres to its original decision with the following addendum.

"The government and the defendant apparently disagree as to the effect on the defendant's sentence of our reversal of the convictions on counts 5, 6, and 8. Compare Thorpe's October 28,1998, Supplemental Memorandum on Petition for Rehearing, pages 7-8, Supplemental Point 3 (arguing that reversal of these counts would result in a lower sentence) with Government's September 9, 1998, Response to Petition for Rehearing, page 3, and Brief for the United States, page 42 n.24. Since we are remanding the

case to the district court for alteration of the sentence with respect to the restitution in any event, the district court is free, if it so chooses, to address this conflict. We express no opinion whatsoever on the matter."

Accordingly the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk